IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

JOSE RAUL MENDEZ,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO. 5:16-CV-104-RWS-CMC
	§	
v.	§	
	§	
UNITED STATES OF AMERICA,	§	
	§	
Defendant.	§	
	§	

ORDER ADOPTING REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

Petitioner Jose Raul Mendez, an inmate confined at the Dalby Unit in Post, Texas, proceeding *pro se*, brought this motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Court referred this matter to the Honorable Caroline M. Craven, United States Magistrate Judge, at Texarkana, Texas, for consideration pursuant to applicable laws and orders of this Court. The Court has received and considered the Report and Recommendation of United States Magistrate Judge (Docket No. 6) along with the record, pleadings and all available evidence. The Magistrate Judge recommends this motion to vacate, set aside or correct sentence should be denied. A copy of the Report was sent to the parties. Mr. Mendez acknowledged receipt of the Report on October 31, 2017 (Docket No. 7). No objections to the Report and Recommendation have been filed to date.

The Court agrees with the Magistrate Judge's findings and conclusions. Mr. Mendez is not entitled to relief as his sentence was not enhanced under the career offender provision of the United States Sentencing Guidelines and his reliance on *Johnson v. United States*, 135 S. Ct. 2551 (2015) is misplaced. Moreover, because Mr. Mendez was sentenced pursuant to a binding

11(c)(1)(C) plea agreement for the mandatory minimum sentence under 21 U.S.C. § 846, any adjustments affecting his criminal offense and history levels did not affect his sentence.

Accordingly, finding no plain error in the findings of fact and conclusions of law of the Magistrate Judge, the Court **ADOPTS** the Report and Recommendation of the Magistrate Judge (Docket No. 6) as the findings and conclusions of this Court. It is thereby **ORDERED** that Mr. Mendez's motion is **DENIED**.

Furthermore, the movant is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the movant to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the movant need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the movant, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000), *cert. denied*, 531 U.S. 849 (2000).

Here, the movant has not shown that any of the issues raised by his claims are subject to debate among jurists of reason. The factual and legal questions advanced by the movant are not novel and have been consistently resolved adversely to his position. In addition, the questions

presented are not worthy of encouragement to proceed further. Therefore, the movant has failed to make a sufficient showing to merit the issuance of a certificate of appealability. Accordingly, a certificate of appealability shall not be issued.

So ORDERED and SIGNED this 20th day of December, 2017.

Robert W Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE